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IN THE

# Supreme Court of the United States

OCTOBER TERM 1965

No. 49

EDWARD MISHKIN,

Appellant,

*against*

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## BRIEF FOR THE APPELLANT

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The Court of Appeals did not write an opinion. The Appellate Division did not render an opinion on the subject matter of this appeal (although it wrote with respect to another phase, in 17 A. D. 2d 243). The trial court wrote an opinion reported in 26 Misc. 2d 152, and is also found at page 720 of the Transcript of the Record.

### Jurisdiction

(1) The jurisdiction of this court is conferred by 28 U.S.C. § 1287(2). The following decision sustains the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York,* 333 U. S. 507.

(ii) The judgment of affirmance by the New York Court of Appeals was made and entered on December 3, 1964. Notice of Appeal to this court was filed on December 16, 1964 in the Criminal Court of the City of New York, the court possessed of the record.

(iii) The Court of Appeals amended its Remittitur to read as follows:

> "Defendant argued that Section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that Section 1141 of the Penal Law was valid and that there was no violation of the rights of the defendant either under the Constitution of the United States or the Amendments thereto." Page 749 Transcript.

(iv) Probable jurisdiction was noted on April 5, 1965.

## Questions Presented

(1) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States in that it proscribes publications that are sadistic and masochistic?

(2) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of sadism and masochism?

(3) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of obscenity?

(4) Was Section 1141 of the Penal Law unconstitutionally applied to the publications in this case?

(5) Are the publications obscene within the construction of the Fourteenth Amendment to the Constitution of the United States?

(6) Was the Fourteenth Amendment violated by the conviction of the appellant without proof that he knew the obscene nature of the contents of the publications?

(7) Were the searches of and seizures at the appellant's premises in violation of the Fourth Amendment to the Constitution of the United States?

## Statute Involved

Section 1141 of the Penal Law, in pertinent part, reads as follows:

> "1. A person who * * * has in his possession with intent to sell, lend, distribute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book * * * or prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * or who,
>
> "2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them.
> "Is guilty of a misdemeanor * * *."

(The full statute is set forth in Appendix A.)

## Statement

Permission was granted to appeal to the Court of Appeals by a judge of that court, who certified that there were questions involved which ought to be reviewed by that court. Thereafter, that court affirmed the conviction. The conviction carries a sentence of three (3) consecutive years of imprisonment and fines totalling $12,000.

The pertinent charges against appellant are 159 counts classified as follows:

Counts 1 through 62 deal with unlawful possessing with intent to sell certain "obscene, lewd, lascivious, filthy, inde-

cent, sadistic, masochistic and disgusting" books,—all adjectives stated conjunctively.

Counts 63 through 110 deal with unlawful publishing the aforesaid books,—characterized conjunctively.

Counts 111 through 159 charge him with unlawfully hiring others to prepare said books,—also characterized conjunctively.

The record does not show that appellant had knowledge that the books offended the statute, even if he does show that he knew they were erotic. And if he is to be assumed to have known, constructively, there is also lacking any proof in the record that appellant knew the character of the books whether they were obscene, sadistic, or masochistic, as charged by the Information.

He was found guilty of 140 of the counts (Transcript 699).

## Summary of Argument

The appellant was charged with either possessing or publishing or hiring others to prepare for publication about 72 titles of books which are alleged to be obscene, sadistic and masochistic under a statute which forbids either of such types of publications, and the statute is stated *disjunctively.*

The appellant challenges the validity of the statute insofar as it proscribes publications that deal with sadism and masochism, on the ground that the Constitution excludes only obscene publications from its protection. By the history of the amendment of the statute in 1956 it cannot be argued that sadism and masochism are ~~not~~ synonyms for the word obscenity. Likewise, it cannot be presumed that the legislature merely provided a superfluous tautology and did an idle act by adding nothing to the existing obscenity law. At the commencement of this prosecution there was no construction by the highest court of the state

nor is there now that the words are synonymous. Nor was there any construction to that effect by any court in the state at the time the prosecution was commenced. To attempt in this prosecution to construe the statute in that manner for he first time, to catch this appellant within such scope would deny him due process of law.

The statute in prohibiting publications dealing with sadism and masochism is also invalid in that it is indefinite. Sadism and masochism in their meaning to ordinary men, mean, the pleasures derived from the infliction of pain, and the pleasure derived from the reception of pain, respectively. Such attitudes in literature are ordinary and widespread. Literature is full of painful situations in which the actor derives pleasure from them. And the enjoyment of sacrifice, asceticism, and hardship, described in literature, is also common depiction. Since this is the common application of the words in their broad range they would fall within the condemnation of *Winters* v. *New York,* 333 U. S. 507.

Nor are the books in question obscene within the interpretation given to that word by this court. These books or at least most of them (their character was not individually separated by the trial court or the prosecution, but treated as a lot) were alleged by the prosecution to be "bondage" type of writings. As such they may be offensive and vulgar to the average person, but not prurient. The trial court characterized them as "sickening". One would hardly associate an aphrodisiac with what sickens. The Court of Appeals of the Second Circuit in *Klaw* had occasion only in July of 1965 to compendiously discuss these bondage books. In the belief that its opinion, not yet reported, would be valuable, it is set forth here in full in Appendix B. The conclusion of that court is consistent with the argument made here that this type of literature may have a special appeal as in the material in the *Manual Enterprises* case, and cannot on its face, without more, be condemned as obscene.

Mishkin also argues that there is no proof that he knew that the character of the books violated the statute. He may have known that they dealt with sex or were erotic, but nothing in the record shows that he had knowledge they were of the character the law forbade.

Appellant also contends that the construction of Section 1141 of the Penal Law is invalid on the ground that it is vague and that the construction put on the term obscenity by this court does not clarify what obscenity really means, at least as applied to the books in this case.

Another contention of appellant is that the seizures of the many thousands of copies of many titles involved in this case were in violation of appellant's rights as protected by the Fourth Amendment. Seizures were made under alleged authority of a warrant at one place where 17,000 volumes were seized. This was before the *Mapp* case was decided by this court. The volumes so seized were admitted in evidence over objection, subject to the production by the prosecution of the warrant and of the officer in charge. They were not produced. At that time the law of New York allowed illegally seized evidence to be admitted. Seizures of thousands of volumes were also made in those bookstores allegedly owned or controlled by appellant. The appellee admitted that no warrant for same was procured. Appellee contended that since these were bookstores open to the public, police officers could go into a store at will and make seizures, because the books would fall under contraband. Appellant contends that to permit a police officer to enter, at random at any time, into an open bookstore and haul away thousands of books from the shelves which he believes are contraband or which he believes violate the statute, makes a mockery not only of the Fourth Amendment but also of the First. Insofar as the courts below did not condemn these abuses, they failed to heed the many decisions of this court.

## ARGUMENT

### I

**Section 1141 Penal Law insofar as it forbids the publishing and distribution of books which are sadistic or masochistic impairs freedom of publication.**

The defendant was prosecuted under the statute which makes criminal the possession, etc. of any "obscene, lewd, lascivious, filthy, indecent, *sadistic, masochistic* or disgusting book".

The words "sadistic" and "masochistic" were added to the statute to separate that type of publication from "obscene" publications. That "sadism" and "masochism" are not synonymous with "obscenity" is demonstrated in these ways:

1. The statute reads in the disjunctive.

2. The history of the law shows that by the New York laws of 1956, Chap. 681, the legislature added the words "sadism" and "masochism" to the existing obscenity statute because the statute had been construed to exclude that type of publication.

Before the words were added to the statute in 1956, the courts construed Section 1141 so as to exclude sadism and masochism. The Commissioner of Police testified:

> ". . . Various decisions in the criminal courts have held that the prohibition of § 1141 of the Penal Law do not include books of Sadism and Masochism.
>
> One of the answers to this problem lies in the inclusion of the words 'Sadism' and 'Masochism' within the provisions of Section 1141 of the Penal Law." New York Legislative Document, No. 32, Vol. 3, 1956, p. 58.

The legislature in reporting on the law said:

> "This bill amends Subdivision 1 of the general obscenity statute 1141 of the Penal Law by adding a prohibition against the publication, distribution or sale of sadistic or masochistic publications." (Italics supplied) New York Legislative Annual, 1956, p. 47.

3. If "sadism" is synonymous with "obscenity", then it is superfluous and confuses. But in the light of the legislative history, it is a distinct offense.

4. The People, appellee, recognized the distinction at the trial when the prosecutor stated as follows:

> "Mr. Stein: Just one word by way of the kind of evidence we hope to adduce here at the trial. I want to call the Court's attention that the *better number* of books involved here are not the normal types of volumes which are prosecuted in pornography cases. They fall within the specific provisions of 1141 dealing with sadism and masochism.
>
> There are, in addition, a great quantity of books which fall within the normal provisions of the pornography section of the Penal Law." (Emphasis supplied)

The statute violates the freedom of speech protections of the Fourteenth Amendment because it prohibits the publication and distribution of literature which is protected. This court has excluded from protection literature which is denominated as obscene. This court also has made clear that other literature may not be restricted.

In *Smith* v. *California,* 361 U. S. 147, the court said, "Our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene." This was a consistent development from *Roth* v. *United States,* 345 U. S. 476 and *Kingsley International Pictures Corp.,* 360 U. S. 684. In the latter case a motion

picture presented the theme that adultery was acceptable conduct. Yet the restraint upon the distribution of the film was condemned by this court.

Since it is obscene publications only that are excluded from the protection of the Constitution, it follows that sadistic or masochistic books remain protected. See also, *Yates* v. *United States,* 354 U. S. 298; *Grove Press* v. *Gerstein,* 378 U. S. 577; *Trailins* v. *Gerstein,* 378 U. S. 576; *One, Inc.* v. *Oelsen,* 355 U. S. 371; *Manual Enterprises* v. *Day,* 370 U. S. 478. In *Manual Enterprises* this court said:

> "Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency."

## II

**"Sadism" and "masochism" are unconstitutionally vague.**

In *Winters* v. *New York,* 333 U. S. 507, this court struck down a part of the same obscenity statute which was directed against publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime". It is impossible to distinguish sadism or masochism from the vagueness in *Winters.* In both instances the ambit of the statute is so wide that it is catchall for publications of all kinds. Sadism and masochism in general refer to acts of cruelty which afford pleasure to the actor in one case, and pleasure to the receiver in the other. That cruelty manifests itself in human conduct is an idle statement. Depiction of the gratification by the tormentor is as commonplace as cruelty itself. The bloodletting in Shakespeare: the cruelties and

revenges in *King Lear,* as one example, depicting the joys to the avenger could be condemned under this statute. So would the gory cruelties in the Bible and in Greek literature. Our contemporary "westerns" would suffer like condemnation.

A ready example is found in the classic, "Two Years Before The Mast" by Richard H. Dana, Jr., Chapter XV, when a sailor asked the captain of a ship why he flogged sailors, the captain replied,

> "If you want to know what I flog you for, I'll tell you. It's because I like to do it!—because I like to do it—It suits me! That's what I do it for!"

The words sadism and masochism are as subjective as the phenomena they attempt to define. They are all-embracing.

In the absence of any construction of the words their common meanings must be accepted in the broad sense of gratification of any kind—whether sexual or otherwise—through cruelty or injury of another person. Under the circumstances, the scope of the statute, broad beyond comprehension as to what is forbidden, the statute falls within these words of *Winters* (p. 519):

> "The Statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes'. Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

The Court of Appeals did not construe the statute in this case nor in any other case either prior to this one, or subsequent thereto. The trial court stated (R. 722) that all the adjectives were synonymous with "obscene", citing a lower court case of coordinate jurisdiction, *People* v. *Brooklyn News Co.,* 12 Misc. 2d 768. Examination of that case discloses that the court did not construe the words sadism and masochism to be synonymous with "obscenity". Even if it had it would lack the authority of a construction by the highest court of the state from which this appeal is taken. Therefore, there is no construction which this court could follow, with the same force and effect as if the legislature had so stated it. See *Winters* where the highest court did make a construction, yet this court found it inadequate as a constitutional protection.

The construction of the statute by the trial court, even if binding on this court is deficient in several respects. It is difficult to conclude in the light of the history of the legislation that the words sadistic and masochistic are synonymous with obscenity. If they were the legislature would not have gone to the trouble in 1956 to add the two words when the word obscene and its allies had been on the books for decades. Nor do the words themselves, as found in a dictionary mean the same as "obscene".

Moreover, the trial court, if it so construed the statute for the first time to apply to Mishkin, it denied him of due process. It thus rendered a construction to catch Mishkin in its net. The statute according to *Winters* must be clear so that persons may know *in advance* what is proscribed. The Constitution does not permit a court to make a guinea pig of a person in order to supply legislative omission. The legislature should have been clear in the first instance. *Lanzetta* v. *New Jersey,* 306 U. S. 451. See also the order of this court in the *Winters* case reported in 91 L. ed. 1873 in which this court requested

counsel to argue the following:

> "2. In view of such construction, assuming the answer to the first question is in the affirmative, was the conviction herein compatible with the Fourteenth Amendment, considering the state of the law to have been what it was at the time that the acts were committed for which the conviction was had?
>
> 3. In view of the construction herein given by the Court of Appeals to subsection 2 of § 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

In deciding the *Winters* case, this court did not answer those questions, because it assumed, for the sake of argument, that the defendant was apprised of the charge. But in doing so, the court cited the *Lanzetta* case for reference to the proposition that due process requires that the defendant, charged with a crime by a statute, construed for the first time, cannot be gathered into the net newly cast by such construction to catch him within it.

## III

**Because the theories under which defendant was convicted are diverse a reversal must follow if any one is held invalid.**

This case was tried, according to the prosecution (see quotation of his words above), on the theory that most of the books fell within the sadistic-masochistic part of the statute and other books within the obscenity provisions. There is no way of determining from the decisions

below on which theory any one of the books was condemned. Accordingly, under *Stromberg* v. *California,* 283 U. S. 359, 368, a reversal must follow.

## IV

**There is no proof that the defendant knew that the books were obscene or sadistic-masochistic.**

Assuming for the purposes of this argument that the appellant published all the books set forth in the information (which is not the charge nor the evidence) and that as a publisher he had knowledge of the *contents* of the publication. Nevertheless, there is no proof that he had knowledge that such contents were of the character within the intendment of the law. This was raised at the trial (R. 126, 682).

From *Smith* v. *California,* 361 U. S. 147, is to be learned that a defendant not only must know the contents of the book, but must know that they are of the character proscribed. In other words, it must be shown that the defendant had made an evaluation judgment concerning the books. The existence of a *mens rea* said the Court "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." This means that it had to be shown not only that the defendant knew the books' contents, but knew they were of the character the law forbade.

This Court said: "and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing bookseller, even though they had not the slightest notice of the *character* of the books they sold" (emphasis supplied). Again Justice Black in concurrence said, "The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book *even though he is unaware of its obscenity.*"

Justice Frankfurter, concurring, said: "But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable *with knowledge of the obscenity*" (emphasis supplied).

The New York Court of Appeals in *People* v. *Finkelstein*, 9 N. Y. 27, 342, said (p. 349):

> "A reading of the statute as a whole clearly indicates that only those, who are in some manner *aware of the character* of the material they attempt to distribute should be published." (emphasis supplied.)

It is clear from the use of the word "character" of the material that the Court agreed with counsel's contention that it is more than mere knowledge of "content" that is required.

There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic; but that knowledge is not sufficient.

*Roth* v. *United States*, 354 U. S. 476, established that a book has to be read *as a whole* in order that it may be evaluated as subject to the statute.

Since it took reading and studying after the trial by a court to determine whether the book fell within the strictures of the statute, how can a judgment of its obscenity be determined without proof that the appellant read it as a whole and made a judgment about it?

If obscenity can be established only after reading of a book as a whole, how can *knowledge* of the obscene contents be asserted against the appellant based on anything but the reading of it?

It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this

crime. This is an assumption that has not found itself tried in experience, for as Mr. Justice Brennan said in *Smith* that accommodation of prosecution is not a sufficient reason to dispense with constitutional protections.

Moreover, as has been shown, that in order to fulfill constitutional requirements in the free press areas, *Smith* held that it is necessary that proof of knowledge of the *character* of the material be shown. From the language of the Supreme Court and Court of Appeals quoted above, knowledge of the character of the publication was recognized as the requirement.

Nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecution to justify the suppression of publications, and it is for it to discover the method for sustaining the burden.

Since the prosecution has failed to establish *scienter*—an indispensable element—the judgment of conviction should be reversed and the information dismissed.

## V

### The books are not obscene within the meaning of the Fourteenth Amendment.

In *Roth* v. *United States,* 354 U. S. 476, the test was laid down whether to the average person, applying contemporary standards, the dominant theme of the material, taken as a whole, appeals to prurient interests. Do these books appeal to prurient interests? At worst, these books can be described as trashy or vulgar. Instead of being an aphrodisiac, they are probably a bore. The trial court found them "sickening" (R. 716). Such a characterization is diametrically opposed to an appeal to pruriency. They would have the opposite effect. Instead of stimulating, they sicken. Such effect is not what *Roth* condemned.

A recent case decided by the Court of Appeals for the Second Circuit, *United States* v. *Klaw,* decided July 15, 1965, not yet reported, provides illumination on the constitutional problem involved in the literature in this case. The comprehensiveness of the opinion of the court by Judge Moore invites its study. Because it is not yet reported, it is set forth in full in Appendix B hereto. The court there reversed a conviction of a publisher of books similar to the ones involved in this case. Some of the titles are the same. Indeed, some of the titles in the present case for which Mishkin, the appellant here, is charged with possessing, were published by Nutrix, in the *Klaw* case. Other titles in this case bear similarity. They are what Judge Moore refers to as the "bondage" type of books. They are not intended to appeal to the "average man" of Roth, but rather to the deviant type of person referred to in the *Manual Enterprises* case.

Judge Moore in *Klaw* points out that in approaching this censorshp problem the history of the litigation in this court must be observed, and that it shows that the censor has been defeated in all cases, save three from 1952 to 1965, and that such cases included books like "Tropic of Cancer" and others. From that he concludes that his court could not conscientiously bring these "bondage" books within the scope of the obscenity statutes. He says:

> "It may be conceded that the 'sado-masochistic' trash disseminated by Nutrix is not artistic or aesthetically pleasing. Nor is any claim made that it has any redeeming literary or social value whatsoever; it is difficult to imagine such a claim being made, at least on traditional grounds."

Since there was no proof in that case—as is also lacking in this one—by the prosecution that this type of literature produces a prurient stimulation and response; and that this is especially true, "when the prurient interest may be

that of a deviant segment of society whose reactions are hardly a matter of common knowledge. It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondage poses have some occult significance, but we doubt that any court would take judicial notice of the reaction that deviates—or the average man—might have to such stimuli".

The court concluded that in the absence of proof that such material was prurient to the deviant or even the average man, the requirements of the First Amendment were not fulfilled.

Added the court:

> "Many would doubt that a judicial system that puts its permissive stamp of approval upon such books as 'Tropic of Cancer' and 'Fanny Hill', to name a few, or certain magazines for homosexuals and sunbathers should then incarcerate or penalize these two defendants for disseminating and publicizing material which might or might not (there is no proof) appeal to someone's 'prurient interest'. Indeed, we can sympathize with Klaw's plight were he to find 'Fanny Hill' or 'Tropic of Cancer' in the prison library, or, if others had pre-empted the only copies, there were available 'Pleasure Was My Business', see Tralins v. Gerstein, 378 U. S. 576 (1964), which contains 'numerous descriptions of abnormal sex acts and indecent conversations supposed to have taken place in (a) Florida brothel.' "

It should be emphasized that neither the trial court nor any of the courts analyzed or dealt with these books on an individual basis. They were all lumped together and characterized as a whole, as the Court of Appeals did in the *Klaw* case. It is therefore impossible to ascertain which books were held to be sadistic or masochistic or obscene. They were all regarded as sickening trash.

We submit that the books in this case fall within the category of those in *Manual Enterprises* as books for those "unfortunate persons whose patronage they were aimed at capturing" (370 U. S. 478, 490) and as in *Klaw* most adults would accept them as such. See also, *A Quantity of Books* v. *Kansas,* 378 U. S. 205; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 114-115.

Whatever high intellectual level these books lack, cannot serve to deprive persons who may find interest in them. And the converse is obvious, that those persons who do not wish to read them can refrain from doing so.

See also, *One, Inc.* v. *Oelsen,* 355 U. S. 371; *Grove Press* v. *Gerstein,* 378 U. S. 577; *Tralins* v. *Gerstein,* 378 U. S. 576; *Jacobellis* v. *Ohio,* 378 U. S. 184; *Times Film Corp.* v. *The City of Chicago,* 355 U. S. 835.

## VI

**Section 1141 Penal Law suffers from vagueness insofar as obscenity lacks definition.**

Although the *Roth* case attempted to define obscenity, the lack of definition remains. Emerson, "Toward A General Theory of the First Amendment", 72 Yale L. J. 877, 938. Judge Moore in the *Klaw* case, Appendix B hereto, compendiously recites the confusion and difficulties that confront the judiciary as well as the bookseller. His opinion in its entirety is a survey of the pitfalls that beset a publisher or distributor. It is well highlighted in the excerpt just quoted.

The guessing at what the law permits and what it forbids has resulted in a three year prison sentence and a $12,000 fine imposed on Mishkin. It is less than justice to impose such penalties because the guess was wrong at a law that is not clear to anyone.

Of course, the dificulty arises,—and perhaps is the difficulty inherent in all laws that attempt to deal with subjective standards and personal taste. When a standard of pruriency is fixed as that of the "average" man, there is an attempt to peer into a most subtle emotional experience that is hardly of the same nature and degree in common with others. How, therefore, is the average man to be determined? Words may be uttered fixing such a standard but the phenomena of life does not comport to the words. As a result, while rendering lip service to a formula, a tribunal unintentionally injects the various subjective reactions of its constituent members. It then follows, as in this case and as in *Klaw,* that the reaction to the publication is one of repugnance. But repugnance is not the same as obscenity. Or, the reaction may be that no standard is necessary, that it is "hard-core pornography", which is another elusive term to escape the difficulties of defining "obscenity". It does not help, because "hard-core pornography" becomes difficult to define, as is obscenity. And it is dangerous to abandon the search for a verbal standard in preference for one that can be defined when seen. It can be supposed that most of the banned literature of the past beginning with the "Decameron" could have met the same optical condemnation. *Manual Enterprises,* we believe, does not permit of such facile disposal.

Nor should literary skill or excellence be the test for absolving a book otherwise deemed prurient, for it would lead to judges becoming literary critics and arbiters of desirable literary standards.

The way out of the wilderness was pointed out in *Winters* v. *New York,* 333 U. S. 507, 510, when it said: "What is one man's amusement teaches another's doctrine. Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

If the statute is construed as the appellee argued below, and in its Motion to Dismiss, in this court, to be aimed

against "what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification" (citing *People* v. *Richmond County News*, 9 N. Y. 2d 578), the answer is that the construction so put on the statute is likewise vague under the *Winters* case, because those characteristics can be applied to any literature, for literature, whether it is the Bible or Shakespeare or contemporary books, is full of morbidity, perversity and the bizarre, whether sexually or otherwise. How can this defendant therefore be singled out of the profusion of literature with such characteristics?

Moreover, why under the Constitution should anyone be forbidden to disseminate or to read what is morbid, perverse or bizarre? Since those elements are a part of literature they cannot be extracted without affecting the function of literature itself. Literature as such is protected by the Constitution. Needless to repeat,—those who do not wish to read it may avoid it.

Under the statute as it reads and as construed the lot of a publisher, such as Mishkin, is similar to that of the Court of Appeals in *Klaw* when it is said:

> "Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? Judged by whom? On what basis? For example, it is the 'average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some

'redeeming social importance' is present? Or, do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight? Or does it suggest that other themes will supply the redeeming social importance? Perhaps the Roth statement is too compact—an unsurprising failing in an initial formulation; the Court itself has acknowledged that it 'is not perfect'. Jacobellis v. Ohio, supra, 378 U. S. at 191. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the wisp."

We believe that we have demonstrated that the statute as applied is vague and indefinite, and does not afford a standard for determining in advance the behavior that is reached by the statute.

## VII

### The books were seized in violation of the First Amendment and the Fourth Amendment.

This case was commenced and tried before the decision of this court in *Mapp* v. *Ohio,* 367 U. S. 643. Until the decision by this court in *Mapp,* the New York courts were governed by *People* v. *Defore,* 242 N. Y. 13, which allowed in evidence materials seized even in violation of the Fourth Amendment. Accordingly, the trial court neither explored the question when raised nor was the New York procedure fashioned in any manner to receive such challenges.

The evidence is that six police officers went to a building at 37 West 20th Street, New York City and in a basement room about 25 by 30 feet and 12 feet high, where a "quantity" of books were seen, and they "seized them all" (Rp. 134). The prosecution promised to produce the police officer, who it was alleged, obtained a search warrant

(Rp. 136). This was never done, although the evidence was admitted subject to the production of that witness by the appellee (Rp. 136).

The tally of the amount of books seized shows that 17,121 volumes were seized (Rp. 139-143). It took two days to remove all the books in the room (Rp. 137). Exhibits 1 through 42 referred to in the Information were among those seized in that room (Rp. 137). This case involves a more flagrant seizure than in *A Quantity of Books* v. *Kansas,* 12 L. ed. 2d 809, for in the *Kansas* case at least an attempt was made toward specificity in the search warrant and the district judge there held a 45-minute hearing in which he examined the books. In this case nothing was done to substantiate the alleged search warrant, although the prosecution had promised to do so (Rp. 136). And the testimony as to the exhibits were received subject to the production of that witness. In *Marcus* v. *Search Warrants,* 367 U. S. 717, an attempt was made to justify the seizures by a warrant addressed to vague "obscene" books. Here, if there was a warrant, its character is completely lacking because it was never produced although promised.

The subject was not further pressed or pursued because of the existing New York law. But since the issue was raised, the constitutional question remained open, *People* v. *Loria,* 10 N. Y. 2d, 368; and *People* v. *Coffey,* 11 N. Y. 2d, 142, where *pre-Mapp* issues, still open, were remitted to the trial court for a hearing. The issue therefore is still before this court to determine whether the seizures of literature were consistent with constitutional protections. *Marcus* v. *Search Warrants of Property, etc.,* 367 U. S. 717; *Jones* v. *United States,* 357 U. S. 493; *Kremen* v. *United States,* 353 U. S. 346.

The appellee argued below that there could not have been an illegal seizure because the person with whom the publications were stored consented thereto. It is certainly a strange doctrine that another person may waive the con-

stitutional rights of the accused, in the absence of some express authority to waive such constitutional rights. See *Stanford, Jr.* v. *Texas,* —— U. S. ——, January 18, 1965; 13 L. ed. 2d 431, where the seizure was with the permission of the wife of the accused.

The appellee also argued that appellant "waived" the production of officer Dimler with respect to the validity and adequacy of the search warrant. Such a waiver is not borne out by the record. Objection to their admission was made by appellant (Rp. 154).

As to the remaining volumes used in evidence (comprising Exhibits 43-72), no warrant for their seizure in large quantities was obtained (Rp. 143-156), and the principles of the *Marcus, Mapp* and *Kansas* cases were violated.

The appellee has sought to justify these wholesale seizures without a warrant (Rp. 153, bottom, 154, 155) in that they were on shelves and racks in three bookstores open at the time to the public. Assuming those were the facts, does this excuse the absence of a warrant? If so, then any police officer may with his own interpretation of offensive literature—interpretation which often eludes the wisest—enter a bookstore and seize any title he chooses or thousands of copies of them, completely ransacking a store and putting it out of business. Yet this is what the appellee is contending he may do. A more frightful use of police power against publications can hardly be imagined! In this case the enormity is compounded by the thousands of copies that were thus seized.

The protections which this court in *Kingsley Books* v. *Brown,* 354 U. S. 436, announced as a minimum protection by the courts in advance of seizure, would thus be frustrated. Also, when books are the subject of seizure this court has insisted that a warrant must describe the items to be seized with "scrupulous exactitude", *Stanford* v. *Texas, supra.*

Were a public officer to be permitted to seize books at will because he believed them banned, or to use a term more palatable, that he believed them to be "contraband," the protections of the First Amendment would surely be defeated along with those of the Fourth. It would provide a loophole for public officials to seize and censor without court approbation. *Bantam Books* v. *Sullivan,* 372 U. S. 58.

The *Marcus* case is the clearest condemnation by this court of this unlawful exercise of censorship through the subterfuge of calling books "contraband". The searches in such cases take on the vicious form of a hunt for evidence, which this court rejected as early as *Boyd* v. *United States,* 116 U. S. 616.

## CONCLUSION

### The judgment below should be reversed.

Punishment of a person by imprisonment for three years and a $12,000 fine because he had disseminated books is shocking enough to rouse meticulous inquiry by those who cherish the freedom of the press.

We believe it has been demonstrated that the prosecution of the appellant must fail because the unsegregated charges of distributing sadistic and masochistic books cannot square with the constitutional protections of all literature, save those that can be clearly found to be within the ambit of obscenity. Moreover, the statute is vague by condemning sadistic and masochistic literature, since those words have broad meanings.

The books themselves, while not of a cultural level, may have an appeal to those to whom they have value. Instead of being prurient, they may be on the contrary, sickening to the average person. The statute itself is vague in

definition of what is condemned as obscene, giving it the construction of the New York Court of Appeals in the *Richmond News* case.

There has been no proof that defendant knew that the books offended the statute.

It has been demonstrated that the vast quantity of books seized and used as the basis of the prosecution were violative not only of the Fourth Amendment, but also the First Amendment in enabling a police officer to ransack open bookstores without a warrant, merely on his opinion that the books are reached by the statute. There has also been an invasion of constitutional protections by the absence of a warrant or proof of its scope, although the prosecution had promised to produce such proof when the evidence was admitted subject to such proof.

Respectfully submitted,

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HAnover 2-1023

August 16, 1965.

## Appendix A

### Exhibit A

SECTION 1141. OBSCENE PRINTS AND ARTICLES

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, card, phonograph record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not equire mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, poses for, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, photograph, motion picture film magazine, pamphlet, newspaper, story, writing, paper, card, phonograph record, figure, image recording, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious filthy, disgusting or indecent books, picture, photograph, motion picture film, writing, paper, card, phonograph record, figure, image, recording, matter, article or thing, named in this section can be purchased, obtained or had or who

has in his possession, any slot machine, motion picture projector or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawings, image, recording, article or object, or who shows advertises, exhibits or transmutes the same, or causes the same to be shown, advertised, exhibited or transmuted, or who buys, owns or holds any such machine with the intent to show, advertise, transmute, or in any manner exhibit the same; provided, that this subdivision shall not apply to motion picture films licensed by the state department of education; or who,

2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or to be fined not less than one hundred fifty dollars, not more than two thousand dollars or both fine and imprisonment for the first offense; for the second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced, to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

3. A person who hires, employs, uses or permits any minor to do or assist in doing any act or thing mentioned in this section is guilty of a misdemeanor and, upon conviction, shall be sentenced to not less than thirty days

or more than one year imprisonment or be fined not less than two hundred fifty dollars nor more than two thousand dollars, or both fine and imprisonment for the first offense and for a second or subsequent offense shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section.

## Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 70—September Term, 1964

(Argued October 15, 1964 Decided July 15, 1965)

Docket No. 28887

UNITED STATES OF AMERICA,

*Appellee,*

—against—

IRVING KLAW and JACK KRAMER,

*Defendants-Appellants.*

Before: WATERMAN, MOORE and SMITH, *Circuit Judges.*

Appeals from judgments of conviction for mailing obscene matter and conspiring to do so entered in the Southern District of New York, after a trial before Inzer B. Wyatt, *Judge,* and a jury.

Reversed.

MOORE, *Circuit Judge:*

Irving Klaw and Jack Kramer were indicted on one count for conspiring to violate 18 U.S.C.A. § 1461 by knowingly using the mails for the carriage of "articles, matters, and things, which were non-mailable in that they were obscene, lewd, lascivious, indecent, filthy and vile." They were also charged with having knowingly used the mails to distribute

"circulars, advertisements and notices which were non-mailable in that they gave information directly and indirectly, where, how, from whom and by what means certain obscene, lewd, lascivious, indecent, filthy and vile matters and things might be obtained." In addition, Klaw was indicted on forty-three counts for using the mails to transmit "certain articles, matters and thing . . . , to wit, printed circulars, pamphlets, booklets, drawings, photographs and motion picture films, which were non-mailable in that they were obscene, lewd, lascivious, indecent, filthy and vile." Nine of these counts were eventually dismissed, leaving thirty-four. Klaw was also indicted on forty-one counts for using the mails to carry certain "circulars, advertisements and notices, . . . which were non-mailable in that they gave information directly and indirectly, where, how, from whom and by what means, certain obscene, lewd, lascivious, indecent, filthy and vile articles, matters and things might be obtained." Eleven of these counts were eventually dismissed, leaving thirty.

The conspiracy was said to have run from June 1, 1960, until the date of the indictment, June 27, 1963. The substantive counts were each based on individual mailings of materials over a period running from July 25, 1958, to May 6, 1963.

At a jury trial, the Government produced six witnesses whose receipt (or whose son's receipt) of circulars and materials had been the basis of thirteen of the thirty-four "obscene materials" counts and ten of the thirty "publicizing" counts. The lion's share of these mailings had been to one Duane Thoman of LaGrange, Kentucky, which name was one of the 300 or so aliases of Postal Inspector Harry Simon of Washington, D. C., who testified at the trial. Three of the Government's witnesses were parents who, while rummaging through Junior's bureau drawer, found that their respective adolescent offspring were exploring

on their own a new world just coming into view. One Junior also testified but only as to his receipt of items from Nutrix.

Klaw is the owner of Nutrix Co., a New York based establishment that prints and publicizes materials—stories, photographs and drawings in the "bondage" genre. Much solicitation and distribution is carried on through the mails, particularly by way of mail order ads appearing in magazines likely to have a male clientele. These "bondage" booklets usually contain some twenty to twenty-five photographs or crude drawings of females—some scantily clad, some tightly trussed, and all voluptuous—subjecting other women and men to various tortures and indignities, including violent and forcible deformation of the body, while being gagged, fettered and bound in bizarre postures. The booklets bore such titles as "Sorority Girls Stringent Initiation," "Female Doctor Forced into Bondage," "Girls Concentration Camp Ordeals," "Dominating Woman Turns Man into Girl," "Men in the Ladies Room," and the like. A text in each booklet described in a puerile and asinine fashion the activity depicted in the drawings. One booklet entitled "The Devil of Yocherwalden" pictures female "Gazi" guards subjecting female prisoners to brutal tortures at the direction of the "Gazi" commandant "Elsi Achstunk." The captives and tormentors are drawn with exaggerated female physical characteristics, clothed in tight-fitting garments, wearing black leather shoes with very high heels, and posed in unreal positions. There were also photographs of "Fighting Girls," corset and high heel shoe scenes, and girls in rubber apparel. Photographs offered for sale were in many instances taken from motion pictures said to have been recently released, such as "Blood of the Vampire," "Slaves of Carthage," and "The Mystery of the Black Whip." Amateur "bondage" photographs were often

solicited. Bulletins published by Nutrix advertised its publications in various bondage series. All these materials are described to us as being "sado-masochistic," and we are referred to Krafft-Ebing's *Psychopathia Sexualis* for further elucidation.

Nutrix is apparently a long-time disseminator of substantially the same type of bondage materials as those involved here. Surveillance by the Postal authorities (Inspector Simon) had commenced in 1951 and continued for four years, at which time no criminal reference was made. However, an administrative proceeding was then begun which culminated in the Postmaster-General's ordering that mail addressed to Klaw be marked "unlawful" and returned to the sender, pursuant to then 39 U. S. C. A. § 259a (now 39 U. S. C. A. § 4006). Klaw sought to enjoin the Postmaster from implementing that order, but was unsuccessful. See *Klaw* v. *Schaffer,* 151 F. Supp. 534 (S. D. N. Y. 1957). This court affirmed *per curiam* the District Court's conclusion that the Postmaster General had acted within his statutory authority and that there was substantial evidence in that record to support the hearing examiner's finding that the material was obscene. 251 F. 2d 615 (2d Cir. 1958). This court's judgment was vacated by the Supreme Court on other grounds and the complaint was dismissed. 357 U. S. 346 (1958). Thereupon Inspector Simon resumed his investigation. In 1960 he recommended prosecution, but no official action was taken until 1963. Kramer apparently began working for Nutrix in 1960 as manager of the New Jersey warehouse. In addition to these facts, the jury also had visual impressions from observation of the Nutrix materials introduced on trial.

Defendants were found guilty on each of the sixty-five counts that went to the jury. Klaw received concurrent sentences of two years' imprisonment on counts 1 to 5, with a $1,000 fine on each count; he received a suspended sen-

tence on each of the remaining counts.[1] Kramer was fined $2,500 on count 1 and received a suspended sentence. Both Klaw and Kramer appeal, claiming that their motion for a directed verdict of acquittal was erroneously denied because there was insufficient evidence relating the Nutrix materials to "obscenity" or to "prurient interest."

In approaching this controversy arising out of another of our society's attempts at censorship, it is helpful to have in mind the scope of the problem and the variety of ways in which it arises. Cases in the Supreme Court over the past decade or so have come into being because state and city police officers, state attorneys, general and federal district attorneys, state motion picture licensing bureaus, state youth morality commissions, federal Post Office Examiners and Inspectors, state and federal judges, and juries have considered a variety of movies, books and magazines to be "sacrilegious," "immoral," "obscene," or "objectionable." The specific items have run the gamut from motion pictures like "The Miracle," "La Ronde," "M," "Native Son," "The Game of Love," "Lady Chatterley's Lover," "Les Amants," and "A Stranger Knocks" to books like "Nights of Horror," "Peyton Place," "Pleasure Was My Business," and "Tropic of Cancer," to magazines like "One—The Homosexual Magazine," "MANual," "Trim," "Grecian Guild Pictorial," "Playboy," "Rogue," "Frolic," other "girlie-type" magazines, and nudist magazines. Publishers, exhibitors, distributors and sellers of these materials have been subjected in state and federal courts and agencies to set-backs includ-

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[1] The conspiracy count was punishable by up to five years' imprisonment and a fine of up to $10,000. 18 U. S. C. A. § 371. Knowing use of the mails for the carriage of non-mailable matter is punishable by up to five years' imprisonment and a fine up to $5,000 for the first offense, and up to ten years' imprisonment and a fine of up to $10,000 for each subsequent offense. 18 U. S. C. A. § 1461.

ing stiff fines and jail sentences, seizure of the materials, injunctions against distribution, denial of licenses needed to exhibit a motion picture, and loss of the privilege to use the United States mails to distribute and publicize the materials.

The censors' successes have been short-lived, however, for in virtually every case decided by the Supreme Court, the disseminator has had a favorable result on one ground or another, save for three cases decided on one day in 1957.[2] Two are significant here—*Roth* v. *United States* and *Alberts* v. *California,* both reported at 354 U. S. 476 (1957), which deal with the constitutional protection and definition of "obscenity," and which constitute the first and

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[2] For convenience we list chronologically the Supreme Court's relevant "obscenity" and censorship decisions. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952) (movie license; "sacrilegious"); *Superior Films, Inc.* v. *Department of Education* (same, "obscene") and *Commercial Pictures Corp.* v. *Regents of the University of the State of New York* (same, "immoral"), 346 U. S. 587 (1954); *Roth* v. *United States* (conviction; "obscene"), and *Alberts* v. *California* (same; same), 354 U. S. 476 (1957); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957) (injunction; same); *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35 (1957) (movie license; same); *One, Inc.* v. *Olesen,* 355 U. S. 371 (1958) (mail; same); *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372 (1958) (same; same); *Kingsley Int'l Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U. S. 684 (1959) (movie license; "immoral"); *Smith* v. *California,* 361 U. S. at 147 (1959) (conviction; "obscene"); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961) (seizure; same); *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962) (mail; same); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963) (warnings; "objectionable"); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964) (conviction; "obscene"); *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205 (1964) (seizure; same); *Tralins* v. *Gerstein,* 378 U. S. 576 (1964) (injunction; same); *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (1964) (same; same); *Freedman* v. *Maryland,* 380 U. S. 51 (1965) (movie license); *Trans-Lux Distrib. Corp.* v. *Board of Regents of the University of New York,* 380 U. S. 259 (1965) (same; "obscene").

apparently only opinion subscribed to by a majority of the Court. In both cases convictions for violation of federal and state statutes pertaining to "obscenity" were upheld by divided Courts—5 to 4 in *Roth*, and 6 to 3 in *Alberts*.

But if the censors won the battles of *Roth* and *Alberts*, the subsequent application of the principles of those cases suggests that as far as the war against pornography goes, the victory was only Pyrrhic. Since 1957 and *Roth* the "obscenity" situation has advanced rapidly. Then Lady Chatterley was still enjoying her clandestine sylvan trysts with her earthy gamekeeper; Fanny Hill's lively and apparently continuous actions were known only to the foreign traveling elite or to the reader of a smuggled copy; and "Tropic of Cancer" was still being seized by vigilant customs agents as contraband. Suddenly the entire picture changed. Whether encouraged by the courts, or whether literary styles turned towards super-realism, or both, authors and publishers were quick to capitalize on the "modern" trend—a trend which they largely made. "Lady Chatterley's Lover" in paperback editions was sold to countless thousands with the court's opinion of approbation attached as a major part of its advertising. No longer did Constance enjoy the privacy of her woodland. Millions of eyes ogling with interest ("prurient" interest probably) stared at her and her lover whilst they enjoyed those moments which court opinions cannot describe lest they risk going "substantially beyond customary limits of candor in description or representation of such matters." *Roth, supra*, 357 U. S. at 487, n. 20.

"Tropic of Cancer" was brought out from under the counter and dusted off. In 1962 it was approved (four justices approving three dissenting) for public reading by a Massachusetts court. See *Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N. E. 2d 328 (1962). In Wisconsin by an equally close vote (four-to-three), the Supreme Court reversed a lower court decision declaring

the book "obscene" and held that, although "much of the language in the book would be offensive to many" and that in one or two instances the "short English words of ancient origin" were "obscene," nevertheless, despite the fact that some episodes would "appeal to prurient interests," it was the court's duty "to respect and enforce in full measure the freedom of expression guaranteed by state and federal Constitutions." *McCauley* v. *Tropic of Cancer,* 20 Wis. 2d 134, ——, 121 N. W. 2d 545, 554 (1963). The Supreme Court of California reviewed a decision determining the book to be "obscence" and, after a comprehensive survey of post-*Roth* decisions, unanimously reversed. *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152, *cert. denied,* 375 U. S. 957 (1963). The New York Court of Appeals in *People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713, 243 N.Y.S. 2d 1 (1963) also by a four-to-three vote held the same book to be "obscene" and reversed a determination by the County Court to the contrary, thus reinstating a conviction by a jury, although ordering a new trial on the issue of *scienter.* This decision, however, the same court (also by a four-to-three vote) considers as having been "now overruled by *Grove Press* v. *Gerstein* (378 U. S. 577)." *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 404, 200 N. E. 2d 760, 763, 252 N.Y.S. 2d 71, 75 (1964).

The most cursory perusal of the cases makes it obvious that the various agencies, officers, judges and juries that initially find material "obscene" do not have the last word to say on the matter. Rather, the Supreme Court has left no doubt that any abnegation of judicial supervision in the "obscenity" field would be inconsistent with its duty to uphold constitutional guarantees. The issue "must ultimately be decided by this [the Supreme] Court." *Jacobellis* v. *Ohio,* 378 U. S. 184, 188 (1964). Mr. Justice Brennan explicitly declared that "this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally

protected." *Id.* at 190. He added that "this is precisely what the Court did in *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35; *One, Inc.* v. *Olesen,* 355 U. S. 371; and *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372." *Id.* at 190, n. 6. In examining the material in *Times Film,* the Supreme Court did not yield in its judgment to the Chicago Police Commissioner and persons appointed by him to inspect the film, "The Game of Love," a District Court judge, and the Court of Appeals for the Seventh Circuit, which found that "the calculated purpose * * * and its (the film's) dominant effect, are substantially to arouse sexual desires." 244 F. 2d 432, 436 (7th Cir. 1957). In *One, Inc.,* the Postmaster, a district judge and the Court of Appeals for the Ninth Circuit had determined that the homosexual magazine "One" had "a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it," 241 F. 2d 772, 778 (9th Cir. 1957). And in *Sunshine Book,* the Postmaster, a Hearing Examiner, the Department Solicitor, the District Court and five out of eight judges on the Court of Appeals for the D. C. Circuit found a "nudist" magazine to come within the proscription of the statute. 249 F. 2d 114 (D. C. Cir. 1957). Thus, the Court has definitely accepted the responsibility of being the final arbiter and has refused to accept the judgments of officials, judges or juries to the contrary. The "sufficient evidence" test on review advocated by the Chief Justice has not been adopted. See *Jacobellis* v. *Ohio, supra,* 378 U. S. at 190, n. 6 (dissenting opinion). The burden on this court at this appellate stage should be no less. And the enlarged judicial function in this area requires that we consider the proof or lack thereof and the manner in which the case was placed before the jury, not just whether the material could possibly be brought within the range of the so-called "obscenity" statute. What, then, upon review, does this record disclose?

*Appendix B.*

The Government rested its case largely on a showing of the exhibits themselves insofar as proof of the "obscene" nature of the Nutrix materials was concerned. As for those exhibits, we need add little to what we have already said. It may be conceded that the "sado-masochistic" trash disseminated by Nutrix is not artistic or aesthetically pleasing. Nor is any claim made that it has any redeeming literary or social value whatsoever; it is difficult to imagine such a claim being made, at least on traditional grounds. *But cf. People* v. *Birch,* 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sup. Ct. 1963).

As for the statute involved, it is hardly a model of drafting precision or clarity. Section 1461 and the subsequent sections of the "obscenity" chapter are regrettably short on terminological and grammatical consistency. Thus, section 1461,[3] which is entitled "Mailing obscene or crime-inciting matter," refers in one part to matter that is "ob-

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[3] Section 1461 provides in full:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can,

*(Footnote continued on following page)*

scene, lewd, lascivious, indecent, filthy or vile"; the other part, dealing generally with abortion and conception prevention, refers to "indecent or immoral" uses and purposes.[4] For section 1461 only "indecent" is specifically de-

*(Footnote continued from preceding page)*

be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mail or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

[4] The third group of 41 counts (reduced to 30) against Klaw were apparently based on the part of § 1461 declaring nonmailable, and thus unlawful to use the mails for circulating or disposing of, certain circulars, advertisements and notices giving information about "obscene" matters. The basis of these counts would seem to be a combination of the first and fourth paragraphs of § 1461. However, it is not entirely clear on the face of the statute that the fourth paragraph is at all related to the first—the only one mentioning "obscene" —being rather just a part of the second through sixth paragraphs, which deal throughout with abortion and conception prevention and other indecent or immoral uses. For example, in § 1462, relating to transportation by common carrier, "obscene" books and the like are dealt with in subsection (a), "obscene" recordings and the like are dealt with in subsection (b), and subsection (c) deals only with abortion and conception prevention items and material giving information about such items. The statutory development shows that substantially the present wording of § 1461 was first enacted in Act of

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fined to include matter "tending to incite arson, murder, or assassination." Section 1462,[5] entitled "Importation or transportation of obscene matters" refers to certain matters that are "obscene, lewd, lascivious or filthy" (but not "vile") or of "indecent" character, as well as "indecent and immoral" uses (again, in a subsection relating to abor-

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July 12, 1876, ch. 186, 19 Stat. 90. The text was cast in its present paragraphed form by the 1949 revision of the criminal code, ch. 768, 62 Stat. 768. The predecessor of § 1462 was Act of February 8, 1897, ch. 172, 29 Stat. 512, which was cast in a form similar to the predecessors of § 1461. Explicit paragraphs and subsections did not appear until Act of May 27, 1950, ch. 214, 64 Stat. 194. However, given our disposition of the case we need not determine whether § 1461 applies to circulars giving information about "obscene" matter, as opposed to simply matters, articles and things "for preventing conception or producing abortion, or for any indecent or immoral use." Moreover, the Court in *Roth* implicitly assumed, without discussion, that it did. See also the discussions in *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 500-18, 520-24 (1962).

[5] Section 1462 provides in full:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

tion and conception prevention). Section 1463,[6] entitled "Mailing indecent matter on wrappers or envelopes" refers to "indecent, lewd, lascivious, or obscene" (but not "filthy," "vile," or "immoral") delineations and epithets. Section 1464,[7] entitled "Broadcasting obscene language," refers to "obscene, indecent, or profane" (but not "lewd," "lascivious," "filthy," "vile," or "immoral") utterances. Lastly, section 1465,[8] entitled "Transportation of obscene matters for sale or distribution" refers to matter that is "obscene, lewd, lascivious, or filthy" (but not "vile" or "profane") or of "indecent or immoral" character. Thus, as the chapter heading suggests, all five sections are concerned with "obscene" matter. They also each mention "indecent," but apply it variously to "character," "use"

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[6] Section 1463 provides in full:

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obsence character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[7] Section 1464 provides in full:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[8] Section 1465 provides in full:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print,

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and "purpose." The other terms—"lewd," "lascivious," "filthy," "vile," "immoral" and "profane"—are used only sporadically.

It should not be surprising, then, that the results of judicial attempts to apply these and similarly worded statutes consistently with the First Amendment have produced strange results. The broad freedom of expression so preferentially protected by the First Amendment, cf. *United States* v. *Carolene Prods. Co.*, 304 U. S. 144, 152, n. 4 (1938), has been found to have an exceptional enclave for "obscenity." The varied and vague terms in such statutes are often subsumed within the one term "obscene" which is found throughout the federal law. Indeed, "it is doubtful whether any standard other than obscenity could stand the Constitutional test." *People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, 771, 174 N.Y.S. 2d 813, 817 (Kings County Ct. 1958) (Sobel, *J.*); cf. *United States* v. *Keller*, 259 F. 2d 54 (3d Cir. 1958). See also *People* v. *Mishkin*, 26 Misc. 2d 152, 154, 207 N.Y.S. 2d 390, 393 (Ct. Spec. Sess. 1960), *aff'd as modified*, 17 A. D. 2d 243, 234 N.Y.S. 2d 342 (1st Dept. 1962), *aff'd*, 15 N. Y. 2d 671, 204 N. E. 2d 209, 255 N.Y.S. 2d 881 (1964), *probable jurisdiction noted*, 380 U. S. 960

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silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication of two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

(1965) (No. 858, 1964 Term, renumbered No. 49, 1965 Term). See also *Friedman* v. *New York*, 34 U. S. L. Week 3014 (New York Sup. Ct., Jan. 21, 1965), *petition for cert. filed*, 33 U.S.L. Week 3369 (U. S. May 13, 1965) (No. 1161, 1964 Term; renumbered No. 135, 1965 Term). We must take great care, therefore, to see that limitations on materials regarded as "obscene" have no more scope than is necessary to effectuate the permissible purposes of such constraints. Cf. *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957).[9]

We do not doubt that "obscenity" may be regulated because it is thought to incite antisocial sexual behavior and

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[9] While knotty problems are raised if one considers the religious background of many of these laws, see Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963), they need not be dealt with if permissible secular purposes and justifications may be found for them. Cf. *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U. S. 582 (1961). Compare *Griswold* v. *Connecticut*, —— U. S. —— (1965). While contemporary secular support is being found for proscription of words, thoughts and scenes that were inconsistent with "religious" conceptions, so too has the content of those conceptions itself been changing. Thus, descriptive words fit for one generation of translators of the Bible are unfit for another. See, *e.g.*, Adams, *The Magic and Mystery of Words*, 68 (1963). Similarly, in a stimulating article, Reverend Howard Moody has recently questioned the whole religious approach to obscenity. Moody, *Toward a New Definition of Obscenity*, 24 Christianity & Crisis 284 (1965). Noting that "from a theological or ethical perspective, 'dirty words' are a terribly inadequate base from which to write a definition of obscenity," *id.* at 286, he suggests that our standard of obscenity is "obsessed with sex and vulgar language; . . . [it should be] defined rather as that material which has as its dominant theme and purpose the debasement and depreciation of human beings—their worth and dignity." *Id.* at 287. If at the same time as the restrictions on publication have been loosened the nation has approached "a state of moral decadence, . . . the evidence of this is not to be found in salacious literature, erotic art or obscene films but in the 'soul-rot' that comes from the moral hypocrisy of straining at the gnat of sexuality and swallowing the camel of human deterioration and destruction." *Id.* at 288.

crime. "Obscene" material and conduct may also sometimes be suppressed and penalized because, like a common law nuisance, it constitutes an unreasonably offensive intrusion into the lives of persons who cannot reasonably avoid it. Other reasons for proscription are more troublesome, such as when the "obscenity" might merely be thought to cause sexual or other stimulation or excitement—unrelated to otherwise deleterious behavior—for willing adults who would not be subject to the material if they did not want to be. Also troublesome is regulation of "obscenity" simply because it reflects sexual values differing from current majority morals, cf. *Kingsley Int'l Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U. S. 684, 688-89 (1959). See generally Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 Column. L. Rev. 391, 392-95 (1963); Kalven, *The Metaphysics of the Law of Obscenity,* in *1960 Supreme Court Review,* 1, 3-4 (Kurland ed.).

However, in considering the permissible meaning of "obscene" in section 1461, we must begin with the Supreme Court's treatment of that statute in *Roth.* That case contains the oft-quoted—although difficult to apply—statement that material is "obscene" if: "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. at 489.[10]

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[10] A problem not discussed in *Roth,* but initially raised in this case, is whether the standard is any different if the typical potential recipient of the "obscene" material may be someone other than the "average man," i.e., a member of a particular group such as a sexual deviate. In *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 481-82 (1962), Justices Harlan and Stewart indicated that the question of the relevant audience was still open, but they did not feel compelled to reach it.

We realize that the Court went on in *Roth* to quote with approval a charge that "the test in each case is the effect of the book, picture

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*Appendix B.*

In addition to its appeal to "prurient interest," proscribable "obscenity" must be "utterly without redeeming social importance." *Roth* v. *United States, supra,* 354 U. S. at 484; *Jacobellis* v. *Ohio,* 378 U. S. at 191. It must go "substantially beyond the customary limits of candor in description or representation." *Ibid.* (quoting American Law Institute, Model Penal Code formulation also quoted in *Roth,* 354 U. S. at 487 n. 20). It must be characterized by "patent offensiveness." *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482 (1962). In brief, it is "hard-core pornography." *Jacobellis* v. *Ohio, supra,* 378 U. S. at 197.

Thus, material is proscribable "obscenity," or hard-core pornography, if it has the requisite prurient appeal, *and* if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance. The last requirement is part of the broad protective mantle of the First Amendment. But, as counsel for defendants repeatedly emphasized, there is no claim in this case that the Nutrix materials have any redeeming social importance. However, the absence of artistic or literary value or other value of social consequence does not, without more, lead to a finding of proscribable "obscenity." Such qualities would

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or publication considered as a whole not upon any particular class but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community." 354 U. S. at 490. But this brief treatment can hardly be taken as ending the matter. When read in light of the familiar admonition (contained in the same charge) that the reactions of the young, the immature, the prigs, or the highly prudish are not decisive, this passage need mean little more than that putatively "obscene" matter more or less directed to or likely to reach all parts of the community must be appraised on those terms, and not on the basis of its appeal to a small segment of the community. Because there may be good reason for proscribing material that is more likely to reach and be responded to in a prurient way by a deviant segment of the community, we are not convinced that prurient appeal to the average member of the community is the only possible standard.

merely insulate what might otherwise be proscribable due to its offensiveness and prurient appeal. See, e.g., *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760, 252 N.Y.S. 2d 71 (1964) (the novel "Fanny Hill"); *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497 (1964) (satirical monologist); Goldman, *The Comedy of Lenny Bruce,* 36 Commentary 312 (1963); cf. *People* v. *Birch, supra.* But cf. *People* v. *Bruce,* unreported, Crim. Ct. City of New York, 1964 (appeal pending); *Attorney General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* —— Mass. ——, 206 N. E. 2d 403 (1965). Compare *United States* v. *Ginzburg,* 338 F. 2d 12, 14 (3d Cir. 1964), *cert. granted,* 380 U. S. 961 (1965) (No. 807), 1964 Term, renumbered No. 42, 1965 Term.

Nor is mere "patent offensiveness" enough. There must in addition be the requisite prurient appeal. Assuming that "prurient appeal" can be adequately defined, there are still some questions: appeal to whose prurient interest? judged by whom? on what basis? For example, is it the "average person" who applies "contemporary community standards" to determine if the "dominant theme" appeals to "prurient interest" (of someone)? Or is it someone else applying "contemporary community standards" to determine that the "dominant theme" appeals to "prurient interest" of the "average person"? Do "contemporary community standards" operate to reduce potential prurient appeal? Or do they operate to establish that some "redeeming social importance" is present? Or, do they operate to measure the "patent offensiveness" of an excess of candor? Again, does the "dominant theme" indicate that the prospective prurient appeal is great or slight? Or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation; the Court itself has acknowledged that it "is not

perfect." *Jacobellis* v. *Ohio, supra,* 378 U. S. at 191. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.[11]

Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an "average man" or a "deviant typical recipient" basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer thinks such appeal exists. The stimulation and reaction with which the

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[11] In this case it is the first of these ambiguities that is most bothersome—that is, appeal, if any, to whose prurient interest, judged by whom, and on what basis. Before, during, and at the end of the trial, and now on appeal, the Government's claim has been that the familiar *Roth* test does not require that the material appeal to the average person. "All that it requires is that the dominant theme of the material—that is, the dominant nature of such appeal as it has—be recognizable to the average person as being an appeal to prurient interest." But in so restating *Roth,* the Government has merely chosen one of several approaches to determination of the requisite prurient appeal, one that does not say to whose prurient interest the appeal must go. Another approach is to say that the material must be shown to appeal to the prurient interest of the "average person" (a close cousin to the "reasonable man" whose assumed existence cannot be questioned lest many a legal edifice become a mere house of cards). Since the "average person" is almost always a possible recipient, even if not the typical recipient, the effect on him or her would always seem important. After all, the prurient appeal element is presumably related to the deterrence purpose. And without now questioning the apparent legislative assumption that stimulation of prurient interest leads to significant anti-social behavior, *but cf. United States* v. *Roth,* 237 F. 2d 796, 804, 812-17 (2d Cir. 1956), *aff'd,* 354 U. S. 476 (1957), if the prurient interest of the average person is stimulated there may be cause for regulation. There may also be cause for regulation of material that stimulates the prurient interest of, not the average person, but the abnormal person—to deviate—who is likely to be its typical recipient. Indeed, there may be even more cause for regulation.

"obscenity" laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the "obscenity" laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the "effect" of the material on the people reached by it. See 354 U. S. at 490.[12]

Of course, we are not asked to decide that Nutrix materials can in no case be a proper basis for exclusion from the mails nor, for that matter, for criminal convictions. Exclusion has already been decided. But while this discussion would be quite relevant to whether particular material alleged to be "obscene" may possibly be found to be beyond the scope of the First Amendment, it is also of central importance to the main problem in this case, which is one of proof and conviction. And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a deviant segment of society whose reactions are hardly a matter of common knowledge. It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondage poses have some occult

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[12] It might be thought that the statute in question is concerned not so much with deterrence of sexually stimulated anti-social conduct as with use of the mails to disseminate unsolicited, undesired offensive materials to uninterested recipients. But the statute is not so narrowly drawn. Indeed, a bill more appropriately designed to cope with that precise problem was recently approved by the House of Representatives. The bill, H. R. 980, 89th Cong. 1st Sess., would permit a recipient or a parent of an infant recipient to return to his Postmaster any mail thought by the recipient to be "obscene, lewd, lascivious, indecent, filthy, or vile" and have the Postmaster notify the sender to discontinue the mailings; such an order would be judicially enforceable. Cf. *Lamont* v. *Postmaster General*, —— U. S. ——, —— n. 2 (1965). See generally Schwartz, *The Mail Must Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 845-48 (1964).

significance, but we doubt that any court would take judicial notice of the reaction that deviates—or the average man—might have to such stimuli. However, some proof should be offered to demonstrate such appeal, thereby supplying the fact-finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles with the postal censors, "obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence." *Klaw* v. *Schaffer, supra,* 151 F. Supp. at 539 n. 6; see *Manual Enterprises, Inc.* v. *Day,* 289 F. 2d 455 (D. C. Cir. 1961, *rev'd,* 370 U. S. 478 (1962)).

In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no "evidence from which the jury could find that it [Nutrix materials] would in fact appeal to the prurient interest of a particular class."

Furthermore, nothing in the record shows that the material even has prurient appeal to the average man. The parent witnesses did not react to Junior's new literary and pictorial delights in a prurient manner, nor did the other recipient witnesses. Junior was not called upon to describe the appeal (if any) to his prurient interest; he probably would not have understood what "prurient" meant any more than do his elders. Most of the witnesses testified that they found the material disgusting or revolting, but that lascivious and lecherous thoughts had not been aroused in them. It is not unlikely that many if not most witnesses and jurors would also consider "disgusting and revolting" more than a few of our current motion pictures, like "Dr. Terror's House of Horrors," many of the newsstand magazines so anomalously entitled "horror comics," the risque birthday, convalescent, and greeting cards found in almost

every corner drug store, as well as the scores of vulgar party favors. Indeed, vulgarity seems to be in vogue. But it is doubtful whether our jails would be well used if convictions were to be based on material that is just "disgusting and revolting." To do so would, we fear, be simply another application of the age-old double standard of the drawing room and the locker room.

If the witnesses presented in this case provide any sampling, these pamphlets and pictures stimulated no one's prurient interest. Although it may be difficult to find expert and other witnesses properly qualified to inform the jury about what does or does not appeal to the prurient interest of the average person, cf. *Klaw* v. *Schaffer, supra,* 151 F. Supp. at 539-40, it would not seem impossible. On the other hand, it is clear that jurors should not consider their own personal reactions as setting the standard; there is too much truth in the observation that "what is pornography for one man is the laughter of genius to another."[13] *Cf.* Ass'n of the Bar of the City of New York, Comm. on the Bill of Rights, *Report on H. R. 319, 88th Cong., 2d Sess. (1964), on "Morally Offensive Mail,"* in *Reports of the Ass'n of the Bar Concerned with Federal Legislation* 54, 56 (1965).

In this case, however, the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur.* The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is "prurient appeal." Because the

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[13] D. H. Lawrence, *Pornography and Obscenity, in Sex Literature and Censorship,* 69 (Moore ed. 1953).

jury was given no basis for understanding exactly how and why the material appeals to its audience, whether deviate or average person, it may too readily supply an explanation—"prurient appeal." Even if the jury did not consist of twelve carefully selected Anthony Comstocks, it might well believe that the predominant appeal of certain acknowledged works of art, sculpture and literature found in all our well-known museums and libraries would be to the prurient interest of the average person, or perhaps someone else. But if that be so, can we allow the censor's stamp to be affixed on the basis of an uninformed jury's misconceptions? See also *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965).

Whatever the value of mere "autoptical" evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the Government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable. See, e.g., *Manual Enterprises, Inc.* v. *Day, supra,* 370 U. S. at 482; *Jacobellis* v. *Ohio, supra,* 378 U. S. at 191-92. Too easily the jury could aid suppression simply on the basis of speculations and suspicions about the prurient appeal of material to some unknown, undefined person whose psyche is not known. With the First Amendment in the background, this cannot be abided.

The state of the record gave the jurors impermissibly broad freedom to convict just because, having no more informative evidence than the material itself, they might think that the average person would "recognize" that the material has prurient appeal. But again, *to whom?* In this case, the jury had insufficient evidence even to "recognize" that the material appealed to the prurient interest of the average person. It had absolutely no evidentiary basis from which to "recognize" any appeal to the prurient

interest of the deviate or the typical recipient—a class never really defined in the record. Because there was insufficient evidence for the jury to consider Nutrix material "obscene" under any proper view of the *Roth* test, the motion for directed verdict of acquittal should have been granted.[14]

This result demonstrates perhaps that a second pronouncement may now be needed to clarify the rule of *Roth.* However, this court is mindful of the difficulties of providing an adequate definition, and it may turn out that the best and most realistic formulation available is that of Mr. Justice Stewart in *Jacobellis* that it is only "hard-core pornography" to which the Constitution's protection does not extend, and although it may be indefinable, "I know it when I see it . . ." 378 U. S. at 197. In any case, following *Roth* the censor's disapproving seal was removed from magazines for homosexuals and pictures of nudist camps in which the

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[14] Even with adequate proof under the average man test, there might still be problems, for the jury was charged to consider the material from the standpoint of the average man in the nation as a whole. We very much doubt whether twelve random New Yorkers can make such a judgment without being further informed about the "common conscience of the nation," if there be such a thing. In any case, we do not read the Court's plurality opinions in *Jacobellis* as unequivocal authority for the proposition. In announcing the Court's judgment, Justice Brennan was speaking only for himself and Justice Goldberg. Justices White, Black and Douglas concurred only in the judgment. Justice Stewart concurred without indicating adoption of the national community standard. As for the dissenters, the Chief Justice explicitly rejected the national standard, as did Justice Harlan, presumably, in light of his views in *Roth.* See *Gent* v. *State,* —— Ark. ——, —— S. W. 2d —— (1965). See also *Keney* v. *New York,* 34 U. S. L. Week 30 1 (New York, Monroe County Ct., 1964), *petition for cert. filed,* 33 U.S.L. Week 3231 (U. S. Dec. 29, 1964) (No. 793, 1964 Term; renumbered No. 39, 1965 Term); *Redrup* v. *New York,* 34 U. S. L. Week 3012 (New York, Sup. Ct., Dec. 17, 1964), *petition for cert. filed,* 33 U. S. L. Week 3341 (U. S. March 26, 1965) (No. 1073, 1964 Term; renumbered No. 72, 1965 Term).

campers are unemasculated by the censor's retouching brush. Through these and other breaches in the dike has swept a veritable flood, as each pamphlet, play or picture seems obliged to be even more candid or daring in order to stimulate the public's prurient palate and assure appearance on the best-seller list. Authors vie with each other to peer through keyholes and over transoms, and to hide themselves at advantageous listening posts in well-selected bedrooms. Their efforts are rewarded by their being able to depict sights and conversations concerning the most intimate phases of sexual activity, with or without the benefit of wedlock. Witness such books as "The Group," "Candy," and "Green Tree in Gedde," the last of which the reviewer in the stately New York Times says is "a mixture of existentialism and erotic prurience" apparently demonstrating "that young people in our tormented civilization are so lost in a wilderness of moral anarchy and philosophical despair that their only interest is in sex and in many of its most debased and perverted manifestations." May 3, 1965, p. 31, col. 3. And the commercial attributes of sexual candor have apparently not gone unnoticed by publishers of even the women's magazines. See Iversen, *The Pious Pornographers* (1965).

A comparison of judicial reactions to recent *causes célèbres* suggests that the judiciary in our tormented modern civilization are also lost in a wilderness. Before it obtained its imprimatur in *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (1964), Henry Miller's "Tropic of Cancer" was "obsence" in Florida and in New York, *People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713, 243 N. Y. S. 2d 1 (1963), but not in California, *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Reptr. 800, 383 P. 2d 152, *cert. denied,* 375 U. S. 957 (1963), Massachusetts, *Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N. E. 2d 328 (1962), and Wisconsin, *McCauley* v. *Tropic of Cancer,* 20 Wis. 2d 134, 121 N. W. 2d 545 (1963). Similar con-

fusion and inconsistency is being manifested as to "Fanny Hill," which is "obscene" in Massachusetts, *Attorney General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* —— Mass. ——, 206 N. E. 2d 403 (1965), but not in New York, *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760, 252 N. Y. S. 2d 71 (1964). This is a book which any layman might not hesitate to say met all the requirements of *Roth.* The most amateur prosecutor could undoubtedly obtain a conviction in any part of the country in comparatively few minutes merely by reading a few pages to the jury. In fact, the same prosecutor might obtain the same result if he exhibited to the jury those glossy prints (mailed in plain envelopes) of quite naked ladies in various poses, despite the fact that they were photographs of famous pictures or statues in art museums. The possibility that deliberating jurors would be uncommonly sanctimonious or hypocritical seems quite obvious. Indeed, most if not all of the censor's defeats have come at the hands of appellate courts, and not the jury.

Many would doubt that a judicial system that puts its permissive stamp of approval upon such books as "Tropic of Cancer" and "Fanny Hill," to name a few, or certain magazines for homosexuals and sunbathers should then incarcerate or penalize these two defendants for disseminating and publicizing material which might or might not (there is no proof) appeal to someone's "prurient interest." Indeed, we can sympathize with Klaw's plight were he to find "Fanny Hill" or "Tropic of Cancer" in the prison library, or, if others had pre-empted the only copies, there were available "Pleasure Was My Business," see *Tralins* v. *Gerstein,* 378 U. S. 576 (1964), which contains "numerous descriptions of abnormal sex acts and indecent conversations supposed to have taken place in [a] Florida brothel." 32 U. S. L. Week 3048. As Chief Judge Desmond pointed out in his dissent in *Larkin,* "Fanny Hill" contains every element which might appeal to "prurient

interest." Judge Scileppi described the book, with considerable justification, as "one of the foulest, sexually immoral, debasing, lewd, and obscene books ever published, either in this country or abroad." *Larkin, supra,* 14 N. Y. 2d at 407, 200 N. E. 2d at 765, 252 N. Y. S. 2d at 78. If no books are available, Klaw together with the public might turn to stimulation through the auditory nerves rather than the optic nerves. The field is no less fruitful for now "Fanny Hill Comes Alive" in an unexpurgated two-record album, giving in 16 stunning scenes "all the lusty, intimate, climactic excitement of this erotic masterpiece . . . Banned for 200 years, now available following New York State Court of Appeals decision overruling the lower courts." So reads the advertising in the Book Review section of a recent Sunday New York Times, April 4, 1965. Thus, another item is added to the party-record list which for generations has delighted those who seek such entertainment with their lusty and ribald old English ballads, entertainment to which Robert Burns, to name one, was a not insubstantial contributor. And in the field of prose, see Mark Twain's "1601" and Samuel Pepys' "Diary." [15] Faced with this vast array of reading and listening matter available to the public, Klaw might understandably wonder as to the meaning of equal protection of law.

In judging the convictions of Klaw and Kramer against the many decisions of the Supreme Court and highest state courts, this court has been left with the definite impression, as indicated above, that there has been insufficient proof presented in this case to justify their penalties and imprisonment. For better or for worse, the standard of what does not arouse "prurient interest" has been established. A particularly careful study of the subject matter involved in this and other cases has been made because this court

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[15] See generally Kronhausen & Kronhausen, *Pornography and the Law,* 43-56, 79-92 (1959).

regards the material as revolting and disgusting. But it is the record and not our feelings that must control. Here the jury had no opportunity to judge the exhibits presented to them by any standard other than their own speculation as to "prurient interest." If they knew the standard set as a matter of law by other cases, their result might have been different. "Due process of law" would be a meaningless cliche if the nonsensical trash that is the subject of this prosecution were allowed to be the basis of a conviction by judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry.

The courts may have opened the floodgates for horror and filth, but if they are to be closed it should be done by the careful drafting of proper laws by our duly elected representatives, and not by a combination of zealous governmental inspectors, prosecutors, and uninformed juries. Then the potential contributors to our culture may have some slight notion of the guidelines and the risks. Of course, it is quite possible that after the public is sated with the products of the new permissiveness the floodtide will ebb of its own diminished momentum. Until then, however, the responsibility of protecting defendants from unguided suppression and conviction weighs as heavily upon this court as it does upon the Supreme Court. While there is some merit to the opinion of those who say that appellate courts should not have to sit as a board of censors supervising the work of the police, the motion picture censorship bureaus, the schools, the churches, and the other organizations that have their lists of good and bad books and motion pictures, there is even more merit to the view that once these preferences are enforced upon others, we "cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis, supra,* 378 U. S. at 190. Unless there be this protection, a

witch hunt might well come to pass which would make the Salem tragedy fade into obscurity. Having in mind the alternatives of jail or freedom, courts must be aware of the facts of the "held-not-to-be-obscene" or "approved" cases, and ensure that the proof is sufficient to allow a fact finder to set this case apart from them. Otherwise it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: "Would you want your son or daughter to see or read this stuff?" A conviction in every instance would be virtually assured.

Finally, to take Mr. Justice Brennan's concluding words in reversing the court below in *Jacobellis* v. *Ohio, supra,* 378 U. S. at 196: "We have viewed the film [the exhibits], *in the light of the record made in the trial court,* and we conclude that it is [they are] not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *United States* . . ." and implicit in the many other decisions of the Supreme Court. (Emphasis added.)

Reversed.